Nos. 17-1717 and 18-18

IN THE

Supreme Court of the United States

THE AMERICAN LEGION, *et al.*,

Petitioners,

v.

AMERICAN HUMANIST ASSOCIATION, *et al.*,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF MILITARY ORDER OF THE PURPLE HEART AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a World War I memorial known as the Peace Cross, located in Veterans Memorial Park, in Bladensburg, Maryland, violates the Establishment Clause of the First Amendment.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Military Order of the Purple Heart, Inc. is a non-profit veterans service organization formed for the protection and mutual interest of all who have been awarded the Purple Heart. The Military Order the Purple Heart is charted by the U.S. Congress. *See* 36 U.S.C. § 140501. The Purple Heart is a combat decoration awarded only to those members of the armed forces of the United States wounded by a weapon of war in the hands of the enemy. It is also awarded posthumously to the next of kin in the name of those who are killed in action or die of wounds received in action.

Composed exclusively of Purple Heart recipients, the Order is the only veterans service organization whose active membership is limited to combat veterans. The Order conducts welfare, rehabilitation, and service work for hospitalized and needy veterans and their families. It has also erected at least one memorial to the recipients of the Purple Heart in every state in the Nation. The Order is non-sectarian, having members of various religions and having members who are non-religious.

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1. All parties have consented to the filing of this brief in letters on file with the Clerk of Court, and the parties were notified of *amicus curiae*'s intention to file this brief at least 10 days prior to the filing of this brief. *See* Sup. Ct. R. 37.2(a). No counsel for a party has authored this brief in whole or in part, and no person other than *amicus curiae*, its members, and its counsel has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

SUMMARY OF ARGUMENT

> *A young healthy child well nursed, is, at a year old, a most delicious nourishing and wholesome food, whether stewed, roasted, baked, or boiled; and I make no doubt that it will equally serve in a fricassee, or a ragout.*

- Jonathan Swift, *A Modest Proposal* (1729).

Swift's proposal to cook and eat Irish babies as a solution to the Irish famine is one of the best and most well-known examples of political satire in Western literature. The shocking proposal effectively conveyed the apathy in English society about the dire situation of the famine.

In similarly shocking style, Judge Thacker of the Fourth Circuit suggested cutting the arms off of a 93-year-old World War I memorial in Bladensburg, Maryland, as an effective means for fixing what the court of appeals deemed a problem under the Establishment Clause of the U.S. Constitution. Unlike Swift's proposed solution, however, Judge Thacker's suggestion was not satire. It was a serious thought, offering what he saw as a possible resolution to a dispute only recently concocted about the 93-year-old World War I memorial.

Our Nation has reached a constitutional tipping point when the courts of appeals genuinely consider mutilating a historic World War I memorial, especially when that memorial has existed for almost a century without complaints from the community. Known locally as the Bladensburg Peace Cross, it has stood on the same land for almost a century. It has been used regularly for secular

events to celebrate Memorial Day, Veterans Day, and other days remembering our Nation's military. There is no evidence that the Peace Cross has ever been the focus of regular state-sponsored religious activities. Nor is there evidence that the Peace Cross has ever coerced anyone to believe in religion, let alone Jesus Christ.

Review of the Fourth Circuit's decision is necessary because the decision addresses a recurring question which has sown confusion in Establishment Clause jurisprudence. Courts are repeatedly asked whether a memorial containing a Latin cross, particularly a military memorial, on public land is constitutional. This question bears special significance for *amicus* and America's military. Tens of thousands of crosses appear in U.S. military cemeteries and memorials in America and throughout the world. The cross has historically been used in medals awarded by the U.S. military to recognize valor and extraordinary service. The court of appeals' decision threatens this well-established and historically uncontroversial practice of using crosses to recognize military valor and sacrifice.

If allowed to stand, the court of appeals' decision could require the destruction or mutilation of a historic monument to World War I veterans. The members of the Military Order of the Purple Heart view this possibility as a serious affront to generations of soldiers, their families, and patriotic Americans. The forced removal of the Peace Cross—a symbol of military "valor," "endurance," "courage," and "devotion"—would erase a piece of American military history. The Peace Cross is an important historic monument reminding citizens of the sacrifice the U.S. servicemembers made during the Great War.

ARGUMENT

I This Case Presents A Substantial And Recurring Issue Of National Importance That Has Created Conflicting Establishment Clause Decisions

The petitions raise questions that require this Court's resolution. The issue is whether a long-standing World War I veterans memorial, having a clear secular history and purpose, is unconstitutional simply because the memorial is in the shape of a Latin cross. This and similar issues have arisen in other cases, and the outcomes have varied. Without clearer certainty about what the Establishment Clause permits, military veterans will be left wondering if long-standing military memorials will be here to teach future generations, or if those memorials will fall victim to complaints of individuals seeking to advance their agenda of eradicating any reference to religion in the public forum.

A. Confusion Exists in Establishment Clause Jurisprudence

There is serious, long-running confusion in the lower courts over the proper application of this Court's Establishment Clause precedents. *See Mount Soledad Mem'l Ass'n v. Trunk*, 567 U.S. 944, 944 (2012) (Alito, J., concurring in denial of certiorari) ("This Court's Establishment Clause jurisprudence is undoubtedly in need of clarity . . . ."); *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 565 U.S. 994, 1007 (2011) (Thomas, J., dissenting from the denial of certiorari) ("It is difficult to imagine an area of law more in need of clarity . . . ."); *Lee v. Weisman*, 505 U.S. 577, 644 (1992) (Scalia, J., dissenting) ("Our Religion Clause jurisprudence has become bedeviled

(so to speak) by reliance on formulaic abstractions that are not derived from, but positively conflict with, our long-accepted constitutional traditions."); *County of Allegheny v. ACLU*, 492 U.S. 573, 627 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part) ("[T]he endorsement test is flawed in its fundamentals and unworkable in practice."); *Lemon v. Kurtzman*, 403 U.S. 602, 666 (1971) (White, J., concurring in judgment) (describing the entanglement reasoning as "a curious and mystifying blend").

The federal courts of appeals have noted this continued criticism. *Smith v. Jefferson Cnty. Bd. of School Comm'rs*, 788 F.3d 580, 596 (6th Cir. 2015) ("This confusion has led our court to opine that the judiciary is confined to 'Establishment Clause purgatory.'" (quoting *ACLU v. Mercer Cnty.*, 432 F.3d 624, 636 (6th Cir. 2005))); *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 343 (5th Cir. 1999) ("Our multi-test analysis in past cases has resulted from an Establishment Clause jurisprudence rife with confusion and from our own desire to be both complete and judicious in our decision-making."). Debate continues, without resolution, on whether the *Lemon* test is a valid and useful paradigm for applying the Establishment Clause. The petitions for certiorari present this very question.

Beyond criticism of *Lemon* itself, further confusion stems from the inconsistent tests set forth in *Van Orden v. Perry*, 545 U.S. 677 (2005), and *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014). In *Van Orden*, the Court appeared to create an exception to *Lemon*, when it upheld the display of the public Ten Commandments. Several, but not all, courts have read it that way. *See Red River*

Freethinkers v. City of Fargo, 764 F.3d 948, 949 (8th Cir. 2014) ("A passive display of the Ten Commandments on public land is evaluated by the standard in *Van Orden v. Perry*, which found *Lemon v. Kurtzman* 'not useful in dealing with [a] passive monument.'" (citations omitted)); *Card v. City of Everett*, 520 F.3d 1009, 1021 (9th Cir. 2008) (applying a "limited exception to the *Lemon* test" for religious displays "closely analogous to that found in *Van Orden*").

Just four years ago, this Court in *Town of Greece* appeared to adopt yet another modified approach. Rather than apply *Lemon*, the Court wrote: "[T]he Establishment Clause must be interpreted by reference to historical practices and understandings . . . ." 134 S. Ct. at 1817. The Court held that, because historical context demonstrated that the challenged practice was not "exploited to proselytize or advance any one, or to disparage any other, faith or belief," the practice did not violate the Establishment Clause. *Id.* at 1819 (internal quotation marks omitted).

Beyond the Fourth Circuit's erroneous analysis in the present case, the disparate results are palpable. For instance, the Second Circuit in *American Atheists, Inc. v. Port Authority*, 760 F.3d 227, 243 (2d Cir. 2014), permitted the display of the Ground Zero Cross in the National September 11 Memorial and Museum ("the 9/11 Museum"), despite the extensive financial support from the state and federal governments.

The present case offers the Court an opportunity to clarify *Lemon* and decide whether it applies to passive monuments, or whether historic military memorials, such

as the Peace Cross, fall under a different Establishment Clause test. The petitions present the Court the opportunity to elucidate the proper consideration that should be given to the historical context of military memorials that have stood for decades, generating no complaints from the community, until legal zealots filed suit seeking to erase all religious references from historic monuments. In fact, even under *Lemon*, this should have been an easy case for the Fourth Circuit, based on the ample evidentiary record. The missteps by the Fourth Circuit reflect the need for this Court's clarification.

B. The Peace Cross Is a Historic Display, Equivalent to an Outdoor Museum, and the Establishment Clause Does Not Forbid Such a Display

The *Lemon* test's limitations manifested themselves with the Fourth Circuit's majority opinion here. The Fourth Circuit's rigid application of *Lemon* led the court of appeals to erroneously discount the history and context of the Peace Cross.

The history of the Peace Cross demonstrates that it is not a stand-alone monument celebrating Christianity. Rather, the Peace Cross memorializes the sacrifices of forty-nine World War I soldiers from Prince George's County. Beyond those forty-nine soldiers, it enshrines the broader sacrifices made by all military members. The Peace Cross sits on a large base that has inscribed on each side one of four words: VALOR, ENDURANCE, COURAGE, DEVOTION. Pet. App. 52a.

At the base of the Peace Cross is a plaque with the names of those forty-nine soldiers, followed by a quote from President Woodrow Wilson: "The right is more precious than peace. We shall fight for the things we have always carried nearest our hearts. To such a task we dedicate our lives." Pet. App. 6a.

The Peace Cross is situated within Veterans Memorial Park. Also standing in the park are other military monuments, including a War of 1812 memorial, a World War II memorial, a Korean and Vietnam veterans memorial, and a September 11th memorial walkway.

The Peace Cross, along with the rest of Veterans Memorial Park, has not been used for any regularly scheduled state-sponsored religious events. As Judge Gregory noted in dissent, "the record demonstrates that only three Sunday religious services were held at the Memorial—all of which occurred in August 1931." Pet. App. 3Pa

The correct application of the Establishment Clause cannot banish the Peace Cross—a historic World War I memorial—from the public sphere, simply because the cross-shaped memorial connotes the religious beliefs of the World War I soldiers and their families whom the memorial honors. No reasonable view of the evidence suggests that the Government is advancing any particular message about the validity of Christianity. Rather, the memorial teaches contemporary observers about the forty-nine men from Prince George's County who sacrificed their lives in World War I.

The Establishment Clause prohibits government from "appearing to take a position on questions of religious

belief." *Cnty. of Allegheny*, 492 U.S. at 593–94. At the same time, the Establishment Clause does not permit courts to "purge from the public sphere all that in any way partakes in the religious." *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring); *see also Salazar v. Buono*, 559 U.S. 700, 719 (2010) (Kennedy, J.). ("The Constitution does not oblige government to avoid any public acknowledgment of religion's role in society.") In fact, "[a] relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution." *Lee*, 505 U.S. at 598.

Here, the Fourth Circuit applied the *Lemon* test in an unduly restrictive manner that overlooks the historical and contextual evidence of the Peace Cross. Under *Lemon*, a display is constitutional if it: (1) has a valid secular purpose; (2) does not have the effect of advancing, endorsing, or inhibiting religion; and (3) does not foster excessive entanglement with religion. *Lemon*, 403 U.S. at 612–13; *see also McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 864 (2005).

The Fourth Circuit's primary, but not sole, error was disregarding the extensive historical and contextual evidence showing that the Peace Cross has zero effect of advancing, endorsing, or inhibiting religion. The Peace Cross is an integral part of an outdoor park that has been used for decades to celebrate our Nation's servicemen and servicewomen.

In many respects, the Peace Cross and the other memorials in Veterans Memorial Park are the equivalent of an outdoor museum. The Park includes military memorials to the country's wars, as well as a memorial to the most horrific terrorist attack on American soil.

In this respect, Veterans Memorial Park is little different from the inclusion of the Ground Zero Cross in the 9/11 Museum. There, as the Second Circuit explained, "a reasonable observer would understand that The Cross at Ground Zero, while having religious significance to many, was also an inclusive symbol for any persons seeking hope and comfort in the aftermath of the September 11 attacks." *Port Auth.*, 760 F.3 at 244. Thus, there was "no concern with the challenged cross display at the second step of *Lemon* analysis." *Id.*

In fact, it would be historically inaccurate to remember these forty-nine men without also acknowledging the Latin cross as a powerful image of the vast number of men lost in World War I. Images abound of memorials showing row upon row of crosses denoting the dead. After 90 years with no complaints, the Peace Cross recalls a time when religion played a more active role in the lives of members of the military. But that historical acknowledgement does not create government endorsement of religion.

In effect, the Fourth Circuit concluded that a cross is necessarily a sectarian symbol, regardless of the context or stated purpose. The panel majority grudgingly conceded that the Peace Cross "contains a few secular elements." In reality, the only element connected to religion at all is the shape of the monument. Everything else, including its setting in Veterans Memorial Park, is secular. The Peace Cross does not have plaques with religious sayings or statements—unlike the Tomb of the Unknown Soldier. It does not include any statement expressing any sentiment for or against religion. Its purpose is to memorialize forty-nine World War I soldiers who made the ultimate sacrifice, by erecting a then-commonly used Latin cross.

The Fourth Circuit also failed to account for the passage of time. In *Van Orden*, it was "determinative" to Justice Breyer that "40 years passed in which the presence of [the Ten Commandments] monument, legally speaking, went unchallenged." 545 U.S. at 702. "[T]hose 40 years," he said, "suggest more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the monument as" an establishment. *Id.* Removing a display standing for decades would "exhibit a hostility toward religion that has no place in our Establishment Clause traditions" and would "create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid." *Id.* at 704.

The Fourth Circuit's superficial analysis contravenes this Court's direction in *Van Orden*. There, the Court explained that a court must ascertain any message conveyed by a publicly-displayed religious monument based on how the monument is used given its surrounding context and history. 545 U.S. at 701 (Breyer, J., concurring). The Fourth Circuit here turned *Van Orden* on its head; it viewed use and context as secondary factors insufficient to ameliorate what the court thought was an inherently sectarian message communicated by the Peace Cross.

The Peace Cross also differs little from how a cross is often used in the military context, where it communicates messages of universal significance that are not limited to a specific religion. When incorporated into medals, the cross communicates that its wearer has performed courageous acts worthy of honor. When erected as part of a memorial to America's veterans, its serves to "honor and respect those whose heroic acts, noble contributions, and patient

striving help secure an honored place in history for this Nation and its people." *Salazar*, 559 U.S. at 721 (opinion of Kennedy, J.). Far from communicating a purely or even predominantly religious message, a cross used as part of a historical veterans' memorial "evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles, battles whose tragedies are compounded if the fallen are forgotten." *Id.*

At a minimum, the Court must correct the misapplication of *Lemon* because, even under *Lemon*, the Fourth Circuit's decision is wrong. Applied true to the Constitution, *Lemon* cannot forbid a historic military monument simply because, as a product of historical circumstance, the military monument contains some aspect of religious origin.

II. The Court Of Appeals' Decision Threatens The Widespread Use Of The Cross To Recognize Valor And Memorialize Sacrifice

The court of appeals rested its decision largely on its characterization of the Peace Cross as an impermissible "sectarian" or "religious" symbol that necessarily projects a message of religious endorsement. As explained above, the court of appeals did not properly account for the nature, history, and context of the Peace Cross. Beyond the threat to the Peace Cross itself, the court of appeals' blindness to historical and contextual evidence threatens to disrupt the U.S. military's longstanding and permissible use of the cross and other religious symbols to honor valor and commemorate the fallen. This is another reason this Court should grant the petitions.

In Arlington National Cemetery, the 24-foot Cross of Sacrifice was a gift from Canada to honor the Americans who joined the Canadian army fighting in Europe before the United States joined World War I.[2] Like the Peace Cross, it has stood for over 90 years.

The Argonne Cross, also at Arlington National Cemetery, marks the graves of more than 2,000 American soldiers.[3] In 1920, their remains were reinterred from battlefield cemeteries in Europe, where they were often marked by crosses.

The cross has also been widely used to memorialize soldiers who died in battle. The United States government embraced the use of the cross in cemeteries devoted to World War I and World War II veterans who died in combat. Tens of thousands of crosses fill America's cemeteries on foreign soil. The cross has likewise been used on numerous occasions as a freestanding memorial to collectively honor America's war dead. These are all threatened by the Fourth Circuit's decision.

Also constitutionally suspect under the Fourth Circuit's reasoning is the Tomb of the Unknown Soldier in Arlington National Cemetery. The Tomb of the Unknown Soldier was approved by Congress on March 4, 1921.[4]

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2. Arlington National Cemetery, Canadian Cross of Sacrifice (WWI/WW II/Korea), http://www.arlingtoncemetery.mil/VisitorInformation/MonumentMemorials/CanadianCross.aspx (last visited July 26, 2018).

3. Library of Congress, Argonne Cross Memorial, https://www.loc.gov/item/thc1995010617/PP/ (last visited July 26, 2018).

4. Arlington National Cemetery, The Tomb of the Unknown Soldier, https://www.arlingtoncemetery.mil/Explore/Tomb-of-the-Unknown-Soldier (last visited July 26, 2018)

Relevant to the present case are the words inscribed on the back of the Tomb: "Here rests in honored glory an American soldier known but to God." If a monument in the shape of the cross—with nothing else—is sufficient to violate the Establishment Clause, then so may be a tomb to the Nation's most well-known soldiers acknowledging the existence of God.

Those seeking to eradicate any religiously-related war memorial from public view will not stop. Next up for dismantling by the American Humanists is the Bayview Park Cross, a World War II memorial that has stood for over 75 years. Built on the eve of World War II, the cross is now a respected historic landmark in the community. As Pensacola Mayor Ashton Hayward has described it, the Bayview Park Cross is "a community gathering place, an integral part of my town's fabric, a symbol to our local citizens—religious and non-religious—of our proud history of coming together during hard times." Ashton Hayward, *In Pensacola, We're Fighting to Keep Our Memorial Cross* Washington Examiner (Oct. 4, 2017).[5]

The Fourth Circuit's reasoning also threatens the legitimacy of numerous military awards. In the United States and around the world, the cross has been incorporated into dozens of honorific military medals. The United States Armed Forces recognize especially meritorious conduct with various medals of valor taking the form of a cross, such as the Distinguished Service Cross, *see* 10 U.S.C. § 3742; the Navy Cross, *id.* § 6242;

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5. https://www.washingtonexaminer.com/in-pensacola-were-fighting-to-keep-our-memorial-cross/article/2636159 (last visited July 26, 2018)

the Distinguished Flying Cross, *id.* § 6245; the Air Force Cross, *id.* § 8742; and the Coast Guard Cross, 14 U.S.C. § 491a.

III. The Court Of Appeals' Decision Is An Affront To Our Nation's Military Families

Finally, the court of appeals' decision is an affront to generations of soldiers, their families, and patriotic Americans. The Fourth Circuit's panel opinion mechanically proceeds through the three prongs of the *Lemon* test, with nary a consideration of the effect it will have on the morale of veterans and their families. The Military Order of the Purple Heart finds it difficult to believe that our Nation's Founders would countenance a legal test that legitimizes and authorizes the destruction of a near-century-old memorial honoring military men who sacrificed their lives so the rest of the Nation can live in freedom.

The present case is yet another in a long line of continued assaults on public monuments erected decades ago. These monuments exist so our Nation does not forget the sacrifice our military members made to safeguard our Nation's freedom. The Government cannot remove the Peace Cross "without conveying disrespect for those the cross [is] honoring." *Salazar*, 559 U.S. at 716 (opinion of Kennedy, J.). Tearing down the Peace Cross or removing its arms will be "viewed by many as a sign of disrespect for the brave soldiers whom the cross was meant to honor." *Id.* at 726 (Alito, J., concurring); *see also Van Orden*, 545 U.S. at 704.

As our Nation has diversified, the Latin cross is used less frequently as the primary element of major military memorials. This is unsurprising. Our country evolves, and so do the monuments chosen to commemorate significant military events. And we have seen greater diversity in the images used on headstones at Arlington National Cemetery.

But that is all the more reason to protect historic military memorials such as the Peace Cross. They should not be threatened by misapplications of the Establishment Clause. The First Amendment cannot be a tool used by advocacy groups to erase military history from the public forum.

CONCLUSION

For the foregoing reasons, the petitions should be granted.

Respectfully submitted,

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